NO. 22,791

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

BARROW DEVELOPMENT COMPANY, INC.,

Appellant

vs

THE FULTON INSURANCE COMPANY,

Appellee

BRIEF OF APPELLEE

DELANEY, WILES, MOORE & HAYES
Attorneys for Appellee
The Fulton Insurance Company
360 K Street
Anchorage, Alaska

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I

JURISDICTION AND PLEADINGS

This suit was originally commenced in the Superior Court, State of Alaska, Fourth Judicial District, at Fairbanks, Alaska, by the Appellant, Barrow Development Company, Inc., against the Appellee, The Fulton Insurance Company. (R. 3-7) In the Superior Court of the State of Alaska the suit was designated as Civil Suit No. 67-24. (R. 12) Thereafter, and in accordance with the provisions of 28 U.S.C.A. §1332 and 1441, the Appellee removed the case to the United States District Court for the District of Alaska at Anchorage, Alaska, and the case was thereafter designated as Civil Suit No. A-17-67. (R. 1-2,18) This removal was based upon the undisputed fact that there was diversity of citizenship between the Appellant and the Appellee and that the amount in controversy was in excess of $10,000.00 exclusive of cost and interest. (R. 2,6)

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On June 16, 1967 The Fulton Insurance Company filed a Motion for Summary Judgment in the United States District Court, District of Alaska. (R. 20) On January 18, 1968 the District Court granted the Fulton Insurance Company's Motion for Summary Judgment and entered its judgment with Findings of Fact and Conclusions of Law accordingly. (R. 360-362) The Appellant, Barrow Development Company, Inc., filed a Notice of Appeal from the judgment entered by the District Court. (R. 363) This is a direct appeal from a final decision of the United States District Court and this court has jurisdiction pursuant to 28 U.S.C.A. §1291 and 28 U.S.C.A. §1294(1).

II

STATEMENT OF CASE

The Barrow Development Company purchased a standard provisional form fire insurance policy, No. 1FP 343209 from The Fulton Insurance Company on August 28, 1964, with policy limits of $50,000.00. (R. 24-31) This fire insurance policy pertained solely to inventory of goods, wares and merchandise on stock in the insured's premises. (R. 29)

On December 14, 1964 whatever inventory was on hand at the insured's premises at Barrow, Alaska was destroyed. (R. 4) A lawsuit was filed in the Superior Court, Fourth Judicial District, State of Alaska, on January 17, 1967. (R. 4-7)

The Fulton Insurance Company filed a Petition for Removal to the United States District Court for the District of Alaska. (R. 1-2) An answer to the complaint was filed in the United States District Court on January 31, 1967. (R. 14-16)

The Fulton Insurance Company filed a Motion for Summary Judgment based solely on its sixth affirmative defense as plead in its answer. (R. 16,20-21) In opposition to the Motion for Summary Judgment the Barrow Development Company, Inc., asserted that it had filed a complaint on February 8, 1965 in the Superior Court for the Third Judicial District, State of Alaska, Cause No. 65-181 B and that this action was dismissed without prejudice on June 13, 1967. (R. 37-41)

The Motion for Summary Judgment was scheduled to be heard on September 8, 1967. (R. 56) The Appellant made a Motion for Continuance on August 29, 1967. (R. 57-61) The motion to continue was denied, however, the appellant was given leave to file an affidavit and supplemental memorandum supporting its position in this matter and the Appellee was allowed an additional week after service of the aforementioned to file a supplemental reply. (R. 73)

The Barrow Development Company, Inc., filed a supplemental memorandum in opposition to the Motion for Summary Judgment on September 22, 1967. (R. 77-79) On October 2, 1967 The Fulton Insurance Company filed its supplemental reply memorandum with exhibits. (R. 81-137) On October 5, 1967 Appellant's counsel filed an affidavit with exhibits attached. (R. 140-356) On October 10, 1967 Appellee's counsel filed an objection to the affidavit and exhibits on the grounds that this was not proper or allowed under the Rules of Procedure and furthermore that the exhibits were not relevant or material to the issue raised in the Motion for Summary Judgment or supplemental briefs filed by the parties for determination thereof. (R. 357) Appellant's counsel has improperly included in his statement of facts on this appeal matters shown in the record from pages 140 through 356 which are not relevant, competent or material to the issue raised in the Motion for Summary Judgment nor are they related to the specifications of error set forth in Appellant's brief

on page 8. Appellee's counsel controverts the employment or usage of the matters embodied in the record pages 140-356 as constituting facts which pertain to the issues presented in this appeal. Appellee's counsel further states that the matters referred in the record pages 140-356 do not fully and accurately portray all the matters that were material or relevant to the proceedings involved in and decided by the Superior Court in action No. 65-181 B.

The District Court granted the Motion for Summary Judgment and entered its Findings of Fact and Conclusions of Law on January 18, 1968. (R. 360-362)

III

SUMMARY OF ARGUMENT

ARGUMENT NO. 1

The Appellant attempts to circumvent the one-year contract limitation specified in the fire insurance policy by claiming that this suit sounds in tort rather than contract. A contract action is not convertible to a tort action by simply alleging such or employing words which constitute a conclusion and do not allege facts supporting a tort cause of action. The rights, duties and obligations of the parties are expressly provided for in the provisions of the fire insurance policy. The very existence and creation of these rights, duties and obligations arise solely by virtue of the fire insurance policy and not by a duty imposed by law. The insured, not the adjuster, was obligated to establish the reasonable value of the goods lost by fire as expressly required under the terms of the fire insurance policy. Therefore, this contract cause of action was barred under the one-year suit limitation provision.

(infra 8-13)

ARGUMENT NO. 2

Contract and tort actions can both be subject to a contractual time limitation provision. The one-year time limitation provision under the fire policy involved herein pertains to either a contract or tort action. The Alaska Statute A.S. 21.25.030 adopted the 1943 New York standard fire insurance policy and the case law indicates that any cause of action

thereon commences to run from the date of the fire loss which was December 14, 1964. The complaint in this action dated January 17, 1967 would be barred under the two-year Statute of Limitations even if no suit limitation provision had been provided for in the fire policy. (infra 14-18)

ARGUMENT NO. 3

The Barrow Development Company had no right to bring a cause of action under the Alaska law when a complaint was filed in the Superior Court on February 8, 1965 because it had not filed its annual report or paid its taxes last due. This complaint was a nullity and of no legal effect and did not constitute a valid cause of action. The Alaska Statute A.S. 09.10.240 therefore was not applicable under these circumstances. A contractual limitation provision under the fire insurance policy cannot be avoided by attempting to show that another action had been brought within the limitation provision and this would be particularly true when the other cause of action was void in its inception.

(infra 18-22)

IV

ARGUMENT

I

THE COURT PROPERLY DECIDED THAT THE LAWSUIT CONSTITUTED AN ACTION IN CONTRACT TO ENFORCE THE TERMS OF THE FIRE INSURANCE POLICY AND THAT THE FAILURE OF THE INSURED TO BRING AN ACTION WITHIN THE ONE YEAR LIMITATION PROVISION BARRED ANY RECOVERY IN THIS ACTION

The complaint in this action alleges as follows:

PARAGRAPH II

That on or about December 14, 1964, the plaintiff was the owner of a certain fire insurance policy on its inventory in its building at Barrow, Alaska. Said policy having been issued by Defendant and having the policy number of 343209. (R. 4)

PARAGRAPH IV

That Plaintiff notified Defendant of its loss under the terms of the aforementioned policy and Defendant undertook, through its agent, General Adjustment Bureau, the adjustment of the loss caused to Plaintiff by the fire. (R. 5)

PARAGRAPH V

That Defendant's policy aforementioned is in the sum of $50,000.00. (R. 5)

PARAGRAPH VIII

That Plaintiff was informed of Defendant's refusal to pay Plaintiff anything under its policy for Plaintiff's loss on or about January 25, 1965 by Defendant and its agents. (R. 5)

An action for breach of a promise set forth in a contract is ex contractu but an action arising from the breach of a duty growing out of a contract is ex delicto. Peterson

vs. Sherman, 157 P.2d 863, 866 (Calif. 1945). The nonfeasance or failure to perform a contract affords no basis for a tort action which must show a breach of duty arising out of a contract to have been imposed by law and not by the contract itself. Sutker vs. Pennsylvania Insurance Company, 155 S.E.2d 694 (Ga. 1967).

Under the express terms of the insurance policy involved herein, lines 90 through 122 are appropriate:

> Requirements in case loss occurs. The insured should give immediate written notice to this company of any loss, protect the property from further damage, forthwith separate the damaged and undamaged personal property, put it in the best possible order, furnish a complete inventory of the destroyed, damaged and undamaged property, showing in detail quantities, cost, actual cash value and amount of loss claim;... the insured, as often as may be reasonably required, shall exhibit to any person designated by this company all that remains of any property herein described,...and, as often as may be reasonably required, shall produce for examination all books of account, bills, invoices and other vouchers, or certified copies thereof if originals be lost at such reasonable time and place as may be designated by this company or its representative, and shall permit extracts and copies thereof to be made. (R. 25)

The policy language quoted above makes it abundantly clear that the insured, not the adjuster, was obligated to furnish to the insurer a complete inventory list of the property destroyed or if none were available to obtain books of account, bills, invoices, etc., from its accountant or the merchandise suppliers and furnish these records to the insurer for verification of its claim for the value of the inventory destroyed by the fire. The adjuster's function

as the insurer's representative was to receive this information which the insured was obligated to furnish and to transmit the same with a proof of loss statement to the insurer for its rejection or acceptance.

As the Court in Otto vs. Imperial Casualty & Indemnity Company, 277 F.2d 889 (C.A.A. 8th Cir. 1960), stated in language appropriate to this action at page 893:

> No harm independent of the contract is asserted. This is not a situation where the "tailor" has damaged the garment, but rather one where he has merely defaulted on his obligation to repair it.

This Court citing and quoting from the Missouri case, Kohnle vs. Paxton, 188 S.W. 155, 159 (Mo. 1916), continued as follows:

> A tort is a wrong to another in his rights created by law or existence and consequences of a relation established by contracts, but it cannot be based upon the contract itself, or stated differently a duty imposed upon a landlord to make repairs does not arise out of the relation created by the contract, but rests upon an express stipulation in the contract. Being a duty assumed by the contract, its breach does not constitute a tort.
>
> In the cases at bar, the petitions sound in tort, but they do not disclose such active negligence independent of a contract as will support an action of this character. In view therefore, of the strong trend of authority limiting the right of action in such cases to suits for breach of the contract, we feel impelled to hold that the plaintiffs had mistaken their remedy.

The Appellant in paragraph VI of the complaint alleges negligence on the adjuster's part for failure to establish the reasonable value of the goods lost by the insured which the contract provisions expressly state will be the obligation

of the appellant. The adjuster or representative of the insurer is authorized under the contract language to inspect and receive books or reports submitted by the insurer with the proof of loss statement together with any bills or invoices which would be transmitted to the insurer. The relationship between the insured and adjuster as well as the establishment of the reasonable value of the goods lost is based upon the express provisions of the insurance contract and not upon any duty imposed by law or active negligence independent of the contract itself. (R. 25)

Next, the insured employs the terms malicious, willful, reckless and intentional in the complaint in paragraphs VII, IX, X and XI. (R. 43-44) The insured also refers to the Alaska Statute A.S. 21.10.060 in paragraph IX of the complai with specific reference to the insurance policy involved herein. (R. 44)

In the case of Moffet vs. Kansas City Fire & Marine Insurance Company, 244 P.2d 228 (Kan. 1952) there was an action on a fire policy. The insured refused to pay the amount claimed under the policy and the plaintiff alleged punitive damages in connection with his suit. The language of the Supreme Court of Kansas is appropriate to the instant case as set forth in its opinion on page 233:

> The petition alleges no facts disclosing appellant willfully, wantonly, maliciously refused to pay the insurance. We have often said the use of such descriptive words, standing alone, is not a substitute for essential allegations

> disclosing wanton and malicious conduct, and constitutes a mere conclusion by the pleader.
>
> Mere refusal to pay insurance cannot constitute wanton and malicious conduct when as here an actual controversy exists with respect to liability on the policy.

The insured alleged in paragraph IX (R. 6) a violation of the Alaska Statute A.S. 21.10.060, which provides:

> The department may refuse, suspend or revoke a certificate of authority after notice and hearing for any of the following causes:...
>
> (3) compelling a claimant to accept less than the amount due under the policy or compelling a claimant to sue it to obtain full payment of a claim;...

The statute has no relevance to a contract or tort action between the insured and insurer since the express language of the statute concerns itself with the powers of the Department of Commerce over "foreign corporations" and has no relevance to civil suits between the insurer and the insured.

Furthermore, the great weight of authority holds that punitive damages are not available in an action for breach of contract. Brown vs. Coats, 253 F.2d 36 (D.C. Cir. 1958).

The Appellant cites the case of Crisci vs. Security Insurance Company of New Haven, Connecticut, 426 P.2d 123 (Cal. 1967), in support of its contention that this action sounds in tort rather than in contract. The Crisci case is a tort action. The bald statement by the Appellant that its allegations constitute a tort action is not established by citing the Crisci case which is definitely dissimilar to the

litigation involved here. The Appellant's attempt to allege a tort action certainly does not make it so. The Crisci case involved a suit on an excess judgment for the negligent failure of the insurance company to consider the insured's interest in negotiating a settlement within the policy limits with a third party who had commenced a suit against the insured for his negligent conduct.

Under the general liability insurance policies the insurer has an independent obligation to defend the insured and to exercise good faith in negotiating a settlement with the third party for claims made against the insured for which coverage is provided. The cases referred to by the Appellant in Keyton, Liability Insurance and Responsibility for Settlement, 67 Harv. L. Rev. 1136, 1138 n. 5 are certainly not relevant to the issues raised by this appeal nor are they applicable or related to the rights and obligations of the insured and insurer under the provisions of a fire policy as expressed therein. This is particularly true when the very provisions of the fire insurance policy involved herein placed the obligation on the plaintiff to furnish the proper inventory value by invoices, bills, books, etc., to establish a claim for the actual cash value of any of the inventory destroyed by the fire. This is not a suit involving a possible excess judgment for the failure of the insurer to properly defend or evaluate claims of damage by third parties which might result in a judgment in excess of the policy limits involved.

II

THE CONTRACT LIMITATION PROVISION IN THE FIRE INSURANCE POLICY GOVERNS ACTIONS IN CONTRACT OR TORT

In Alaska a contract limitation under an insurance policy requiring suit to be brought within a prescribed period of time, in the absence of a statute to the contrary, is valid, if reasonable, and the fact that the time fixed is shorter than the general statute of limitations does not invalidate the policy requirement. Sauer vs. Law, Union and Rock Insurance Company, 17 F.R.D. 430 (D.C. Alas. 1954). Similarly, this Circuit Court of Appeals has likewise held this contract limitation provisions to be enforceable. Blanton vs. Northwestern National Insurance Company, 335 F.2d 965 (9th C.A. 1964).

The fire insurance policy involved in this litigation had a contract limitation provision, lines 157-161, which provided:

> No suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity unless all the requirements of this policy shall have been complied with, and unless commenced within twelve months next after inception of the loss. (R. 25)

The fire loss involved in this litigation occurred on December 14, 1964, (R. 4,14), and hence, the time for commencing any action or claim would be from the date the fire occurred. Sager Glove Corp. vs. Aetna Insurance Company, 317 F.2d 439 (7th Cir. 1963); Proc vs. Home Insurance Company, 270 N.Y.S.2d 412 (N.Y. 1966).

Tort actions for personal injuries, as well as actions based upon either a contract or negligence suit can be subject to the enforcement of a contract time limitation provision involving the commencement of a lawsuit. Furr vs. Societa Ital. Transp. Marit. Genoa, Italy, 162 F. Supp. 645 (Dist. Ct. N.Y. 1958); Muse vs. Heime, 189 So.2d 840 (La. 1966).

The case involving facts and issues similar to the present action is that of Reece vs. Massachusetts Fire & Marine Insurance Company, 130 S.E.2d 782 (Ga. 1963) which involved a fire insurance policy with a contract limitation provision identical to the one before this court. The plaintiff, the mortgagee under the policy, sued the insurer alleging the failure of the insured to notify the mortgagee that the policy had expired. In the complaint the plaintiff alleged as one of its grounds that the insurer carelessly, negligently and without fault by the plaintiff, failed to give the ten days written notice of cancellation under the policy causing damage to the extent of the policy limits.

One of the grounds for the defendant's motion for dismissal pertained to the contract limitation provision under the fire insurance policy requiring the suit to be commenced within twelve months after the inception of the loss. The plaintiff realizing the problem involved with this clause in maintaining an action for breach of the contract attempted to circumvent this by labeling his complaint as an action

ex delicto attempting to invoke the statute of limitations pertaining to tort actions. This court rejected the plaintiff's attempt to circumvent this problem by holding that a contract limitation provision applies to both a contract and tort action wherein it stated at page 785:

> However, as we view it, we do not think it at all necessary to decide whether the petition is ex contractu or ex delicto. It makes no difference. In either proceedings the valid stipulation of the contract limits the time within which the action may be sustained to twelve months after the loss. Every right claimed by the petitioner as mortgagee, as well as, every duty allegedly breached by the insurer, all evolve from the one source--the written contract of insurance. If there were any duty imposed on the insurer to notify the plaintiff in writing ten days before any cancellation of the policy; or to notify him of any failure or neglect of the mortgagor to pay premiums upon the renewal of the policy; or to notify and warn the mortgagee of the default of the mortgagor so as to enable the mortgagee to protect his interests, these duties could only have arisen under the provisions of the insurance policy...."Valid terms of the contract itself which limits the amount of damages for which the defendant will be liable, or require notice of a claim within a time limit or the like, are quite generally held to apply even though the action is in tort." (Prosser, The Borderland of Tort and Contract, Prosser Selected Topics on the Law of Torts, (1954) 445.)

It is readily apparent then that the suit filed by the appellant herein falls squarely within the holding of Reece, supra. The specific language of the limitation provision encompasses any claim, i.e., contract or tort arising between the insured or insurer under the fire insurance policy.

Without this fire insurance policy the rights and obligations of the parties could not exist nor could any duty be imposed by law. There appears then to be no logical or valid reason why the one-year time suit provision should not be applied to both contract and tort actions.

The fire insurance policy No. IFP 343209 was a standard one known as the 1943 Edition, New York standard fire insurance policy. (R. 24-25,31-33) This standard form was adopted for use under the Alaska law. See the 1959 Session Laws of Alaska, Ch. 182 §3(a), codified A.S. 21.25.030, repealed by S.L.A. 1966, Ch. 120 §1. The appropriate language of the Alaska statute pertaining to the standard fire policy in full force and effect when this fire loss occurred on December 14, 1964 provided as follows:

> Section III. Standard Fire Policy (a) The standard fire insurance policy known as the 1943 Edition, New York standard form of fire insurance policy, and any changes made thereto made subsequently and approved by the commissioner is hereby adopted as the standard form of fire insurance policy for Alaska.... All such 1943 New York standard form of fire insurance policies issued or outstanding in Alaska from and after said date until such time as the commissioner otherwise rules, shall be valid....

It has been held in numerous cases involving the 1943 New York standard fire policy that the time to sue under a contract limitation provision or under the Statute of Limitations commences to run from the date of the fire loss. Margulies vs. Quaker City Fire & Marine Insurance Company, 97 N.Y.S.2d

100 (N.Y. 1950); Bell vs. Quaker City Fire & Marine Insurance Company, 370 P.2d 219 (Ore. 1962); Ramsey vs. Home Insurance Company, 125 S.E.2d 201 (Va. 1962), 95 A.L.R.2d P.1019.

The Alaska Statute A.S. 09.10.070 entitled Actions to be Brought in Two Years provides as follows:

> No person may bring an action (1)...or for any injury to the person or rights of another not arising on contract and not specifically provided otherwise...unless commenced within two years.

The statutory language above "not arising on contract and not specifically provided otherwise" would seem to recognize the contract right to limit the time for suit in a contract or tort action, or alternatively to recognize the legislative mandate, under A.S. 21.25.030 adopting the New York fire insurance policy, and the case authorities interpreting the same, that the date of the fire loss determines when the cause of action commences. It is undisputed that the fire loss occurred on December 14, 1964. (R. 4) The Appellant's complaint filed in this litigation was dated January 17, 1967. (R. 7) This then was more than two years after the date of the fire loss and would bar recovery in this action even without the enforcement of the specific contract limitation provision in the insured's policy.

III

UNDER THE ALASKA LAW THE PLAINTIFF'S COMPLAINT FILED FEBRUARY 8, 1965 WAS A NULLITY AND OF NO LEGAL EFFECT, AND THE

COURT PROPERLY FOUND THAT THE CONTRACTUAL LIMITATIONS WERE THEREFORE ENFORCEABLE AGAINST THE COMPLAINT FILED ON JANUARY 17, 1967

The Appellant claims that the provisions of the fire insurance policy were tolled when it filed a complaint on February 8, 1965 in the Superior Court for the State of Alaska, Cause No. 65-181 B. (R. 39) This matter was dismissed on the defendant's motion on June 13, 1967. (R. 40-41)

The general rule is that the defense of a statute of limitations applicable to a particular action where it is plead cannot be avoided by showing that another action had been brought within the time period allowed by the statute. Steinour vs. Oakley State Bank, 287 P. 949 (Idaho 1930). This case had a saving statute similar in its wording to the Alaska Statute A.S. 09.10.240 hereinafter set forth; Barr vs. Carroll, 274 P.2d 717 (Cal. 1954); Crow vs. City of Lynwood, 337 P.2d 919 (Cal. 1959).

Therefore, since the contractual limitation provisions are valid and enforceable, even though the time limit prescribed for commencing the suit is shorter than that specified in the statute, then by analogy the complaint filed on February 8, 1965 (which was invalid) cannot be pleaded or referred to for purposes of avoiding enforcement of the contractual limitation provisions involved in this litigation.

The appellant then cites the Alaska Statute A.S. 09.10.240 in support of the contention that it was then entitled

to commence a new action within one year after the dismissal date aforementioned. The language of the statute provides as follows:

> If an action is commenced within the time prescribed and is dismissed upon the trial or upon appeal after the time limited for bringing a new action, the plaintiff or,if he dies and the cause of action in his favor survives, his heirs or representatives may commence a new action upon the cause of action within one year after the dismissal or reversal on appeal. All defenses available against the action, if brought within the time limited, are available against the action when brought under this provision.

The statutory language of A.S. 09.10.240 presupposes that a valid cause of action was filed under the Laws of Alaska before this provision becomes applicable. As will hereinafter be shown the complaint filed on February 8, 1968 was a nullity and of no legal effect under the law of Alaska.

The law holds that whenever a complaint is not based upon a proper or valid cause of action the running of the statute of limitations is not interrupted or tolled. Bortho vs. Polish Natl. Alliance of the U.S. of North America, 119 P.2d 536 (Kan. 1941); Marks vs. St. Francis Hospital and School of Nursing, 294 P.2d 258 (Kan. 1956).

Furthermore, in order for a complaint to be valid the party must have the right to sue at the time the complaint is filed. Jorgensen vs. Baker, 157 N.E.2d 773 (Ill. 1959) Cert. Den. 80 Sup. Ct. 590, 361 U.S. 962, 4 L.Ed.2d 543.

The Alaska Supreme Court in the case of Alaska Mines and Minerals, Inc. vs. Alaska Industrial Board, 354 P.2d 376 (1960) at page 377 cites a portion of the Alaska Business Corporation Act which reads as follows:

> No corporation, foreign or domestic, shall be permitted to commence or maintain any suit, action or proceeding in any court in Alaska without alleging and proving that it has paid its annual corporation tax last due calendar or fiscal year for which such report became due for filing. (A.S. 10.05.720)

In this case there was a suit by a corporation for an injunction to set aside and restrain the enforcement of an award of the Industrial Board. The complaint was dismissed and the corporation appealed. The Supreme Court held that the Alaska Statute prohibited the corporation from commencing or maintaining a suit in any court without alleging and proving that it had paid its annual taxes or filed an annual report as required by law. The court reasoned as follows on page 379 of its opinion:

> The attempt to commence a proceeding in court, when the law provides that this may not be done, logically is the commencement of no proceeding at all. An act which is prohibited can have no legal effect merely because it is done.
>
> The running of the time within which injunction proceedings might have been instituted was not suspended between the date that appellant filed its complaint and the date that it paid its tax...Unless a new action is commenced within the applicable period of limitation, the right is barred. Similarly, compliance with the law after a statute of limitations has run does not serve to validate from its inception an action which had no validity or legal effect at the time it was commenced.

The plaintiff's complaint filed on February 8, 1965 did not allege that the corporation had paid its annual taxes and filed its annual report as required under the Alaska law. (R. 39) The memorandum decision of the Superior Court Judge shows that the plaintiff was not qualified to commence its suit filed on February 8, 1965 and the matter was dismissed under the authority of the Alaska Mines and Minerals case, supra. (R. 40-41)

Thus, under Alaska law the plaintiff's complaint filed on February 8, 1965 was a nullity and of no legal effect. The provisions of A.S. 09.10.240 are therefore inapplicable. The contract limitation provision for commencement of a suit properly bars either a contract or tort action based upon the complaint filed on January 17, 1967 which was approximately two years and one month after the fire loss occurred.

CONCLUSION

Based upon the authorities and reasons hereinabove set forth the judgment of the United States District Court should be affirmed.

By Daniel A Moore Jr
Daniel A. Moore, Jr.

DATED: August 16, 1968
Anchorage, Alaska

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Daniel A Moore Jr

Daniel A. Moore, Jr.